UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JIAQIANG XU,** **Defendant.**	**16 Cr. 10 (KMK)**

DEFENDANT JIAQIANG XU'S MOTION FOR EXTENSION OF TIME TO FILE MOTIONS TO SUPPRESS AND MOTION TO COMPEL DISCOVERY

Defendant Jiaqiang Xu is considering whether he has a good faith basis in law to move to suppress searches conducted pursuant to various search warrants on the grounds that the affidavits submitted in support of those warrants contained false, misleading, or incomplete information. In order to make this determination, defense counsel believes that it needs: (1) certain FBI reports that an FBI agent referenced in his affidavits in support of two search warrants but that the United States has refused to provide and (2) time for an expert retained by Defendant Xu to analyze the agent's representations about various code that Defendant Xu provided to the FBI during the investigation. Defendant Xu, therefore, files this Motion for a 45-day extension of time to file motions to suppress pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and for an order compelling the United States to produce the relevant reports of investigation.[1]

FACTUAL BACKGROUND

Defendant Xu is a Chinese citizen who was employed by IBM in China from November 2010 until May 2014. Complaint, Dkt. No. 1 ("Compl.") at ¶ 7(a). While at IBM, Defendant Xu worked to make repairs to IBM's General Parallel File System ("GPFS") software, including by repairing problems with the underlying source code. The GPFS source code contains portions that are open source material (and, therefore, not trade secrets) and portions that IBM purportedly maintains as a trade secret.

In 2014, the FBI allegedly received a report that Defendant Xu gave GPFS source code to someone.[2] The FBI immediately began an investigation. An undercover FBI agent contacted Defendant Xu in November 2014, posing as a representative of a company that supposedly wanted to hire him to build a data storage platform. *Id*. at ¶ 9. The undercover agent contacted Defendant Xu several times over the next year via email and Skype, always claiming that the company wanted to hire him to build their data source platform. During this time, the undercover agent offered to bring Defendant Xu to the United States, give him a job building a data storage platform, and pay him for the allegedly stolen GPFS source code.

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[1] Defendant Xu is preparing to file other pretrial motions on or before the date set by this Court (August 26, 2016). Defendant Xu seeks this extension only for the filing of potential motions to suppress pursuant to *Franks v. Delaware.*

[2] In the criminal complaint filed in this case, the government alleged that the FBI learned that Defendant Xu had claimed to have access to the source code and was using it in business ventures unrelated to IBM. Compl. at ¶ 8. But, in a subsequent interview, the case agent alleged that Defendant Xu sent the source code to an individual.

As part of his investigation, the undercover agent also asked Defendant Xu to send him emails that contained some of his code and to upload other code onto servers that the FBI made available to Defendant Xu. Defendant Xu believes that the code he provided on both occasions was ***not*** IBM proprietary source code but rather was open source code that could not support charges in this case.[3] In December 2015, the FBI brought Defendant Xu to the United States – claiming they wanted him to meet the owner of the company trying to hire him. During the first meeting, the undercover agent repeatedly asked Defendant Xu to name a price at which Defendant Xu would sell the GPFS source code. Defendant Xu refused to sell it, saying that he could not sell or otherwise distribute the source code to the undercover agent. (He had previously refused to set a price for the source code despite the undercover agents' repeated requests that he do so.) The FBI,

[3] In this Motion and in a separate Motion to Compel *Brady* materials, Defendant Xu seeks discovery of reports that are necessary for him to determine whether the information he sent via email contained open source code or IBM's alleged trade secret.

nevertheless, arrested Defendant Xu and charged him with attempting to steal and sell the source code.

The government obtained seven search warrants in this case. The first two warrants were obtained on September 9, 2015 and September 11, 2015 – after Defendant Xu sent the email with code and uploaded other code to the servers, but before he came to the United States. In the affidavit that he filed with the magistrate court to obtain those search warrants, the agent referenced five FBI reports: (1) a report providing background information about GPFS (*see* September 9, 2015 and September 11, 2015 Agent Affidavits in Support of Application for a Search Warrant for Stored Electronic Communications, attached hereto as Exhibit A, at ¶ 10); (2) a report concerning background information about Defendant Xu (*id.* at ¶ 11); (3) a report regarding information given to the FBI by an individual about Defendant Xu (*id.* at ¶ 12); (4) a report concerning IBM's analysis of code that Defendant Xu emailed the undercover agent on March 16, 2015 (*id.* at ¶ 14); and (5) a report regarding the data that Defendant Xu uploaded to a server in August 2015 (*id.* at ¶ 19)[4].

[4] The other search warrants obtained in this case do not directly reference these specific FBI reports; however, the information from these reports might show that relevant information was not disclosed to the magistrate judge in the subsequent search warrant affidavits.

ARGUMENT

To ensure that search warrants comply with the Fourth Amendment's prohibition against unreasonable searches and seizures, a judge must determine whether the facts and circumstances set forth in the search warrant affidavit establish a fair probability that evidence of a crime will be found in the place to be searched. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). The Supreme Court has held that a search warrant may not be based upon an affiant's knowing or recklessly false statements or material omissions of information that would negate a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

Defendant Xu is attempting to determine whether he has a good faith basis to argue that the affidavits submitted by the FBI agent in support of the September 9 and 11, 2015 search warrants included false statements or omitted material information that would have negated probable cause. Defendant Xu contends that he needs the FBI reports described above in order to assess the accuracy and completeness of the agent's representations to the magistrate court in support of the search warrants. It is worth noting that the agent did ***not*** state in his affidavits that the code Defendant Xu emailed to the undercover agent and the code Defendant Xu uploaded to the server did not contain the proprietary source code. If the reports listed above concerning that code (specifically items 4 and 5 above) indicate that the code was ***not*** GPFS source code (or was the open source portion of the code) – as

Defendant Xu believes they will – those reports may support the suppression of the warrants pursuant to *Franks v. Delaware.* Similarly, if the report about GPFS (item 1) indicates that the GPFS code contains a significant amount of open source code, that fact may also support such a motion, as the agent also did ***not*** disclose this fact to the magistrate court when seeking the search warrants. Finally, one can easily imagine how reports about Defendant Xu and his alleged discussions with some cooperating source (items 2 and 3) could give rise to a motion to suppress under *Franks v. Delaware* if the information was not accurately relayed to the magistrate judge.

The examples set forth above are not the only facts that – if reflected in the FBI reports – might give rise to a motion to suppress pursuant to *Franks v. Delaware*. Any other information that was not accurately relayed to the magistrate court or that should have been disclosed so as not to mislead the magistrate court could give rise to such a motion. The averring agent referenced these reports in his affidavits for the first two search warrants, claiming that the reports gave him the factual basis for seeking the search warrants. The agent having relied upon the reports to get the search warrants, the Court should allow Defendant Xu access to the reports to assess the agent's truthfulness, completeness, and candor.

Defendant Xu has asked the government for these reports, explaining the relevance to defense counsel's analysis under *Franks v. Delaware.* The government has refused to provide the reports (or any other FBI 302s) claiming they "are unaware of any basis for any non-frivolous motion to suppress evidence obtained via search warrants in this case based on Franks." Defense counsel cannot simply rely upon the government's judgment as to whether there is a basis for a "non-frivolous" motion to suppress. Likewise, it would be insufficient for the government to avoid production of the reports by simply telling defense counsel the answers to the issues Defendant Xu raises in this pleading as the reports could contain other relevant information that Defendant Xu has not flagged herein. Defense counsel cannot fulfill its constitutional obligation to Defendant Xu to determine whether a motion to suppress should be filed without the reports relied upon by the agent. The agent had them and used them in making representations to the magistrate court. As a result, Defendant Xu should have them to assess the agent's conduct. Defendant Xu, therefore, asks the Court to compel the United States to produce the reports referenced in the September 9 and 11, 2015 search warrant affidavits.

In addition, defense counsel has recently retained an expert consultant regarding GPFS software and code. (Defense counsel has been working diligently for some time to identify such an expert but only recently identified and retained a qualified individual.) Defendant Xu expects that his consultant will analyze the code that Defendant Xu emailed to the agent and uploaded to the server during the undercover operation. Defense counsel believes that the result of this analysis is also necessary for counsel to determine whether there is a good faith basis for a motion to suppress. The analysis, for example, could confirm that the code at issue was open source code, thereby establishing that the FBI agent withheld critical information from the magistrate court when obtaining the warrant. And again, he could uncover other information that exposes the search warrant affidavits as incomplete, misleading, or false. Defendant Xu, therefore, asks for an additional 45 days to file motions to suppress under *Franks v. Delaware* to allow the expert consultant to complete this analysis.

CONCLUSION

For the reasons set forth above, Defendant Jiaqiang Xu respectfully moves the Court: (1) to compel the government to provide all FBI reports referenced in the September 9 and 11, 2015 search warrant affidavits and (2) for an additional 45 days to file motions to suppress pursuant to *Franks v. Delaware* so that Defendant Xu can analyze the reports requested herein and/or obtain the assistance of his expert consultant to help identify potential arguments supporting such motions.

Respectfully submitted this 22nd day of August, 2016.

/s/ Michael Brown
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LOCAL RULE 16.1 CERTIFICATE OF COMPLIANCE

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that defense counsel has conferred with counsel for the government in an effort in good faith to resolve by agreement the issues raised by this Motion without the intervention of the Court and has been unable to reach agreement.

/s/ Michael Brown
Michael Brown
Georgia Bar No. 088875

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which automatically notifies all counsel of record.

/s/ Michael Brown
Michael Brown
Georgia Bar No. 088875